



New York City Department of Health and Mental Hygiene  
Board of Health

Public Hearing on Proposed Amendment to Article 207  
of the New York City Health Code

Testimony by Michael Silverman  
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My name is Michael Silverman. I am Executive Director and General Counsel of the Transgender Legal Defense & Education Fund ("TLDEF"). I submit these comments on behalf of TLDEF and the members of our community organizing project, the Transgender Health Initiative of New York (THINY).

TLDEF is a nonprofit civil rights organization committed to ending discrimination based upon gender identity and expression and to achieving equality for transgender people through public education, test-case litigation, direct legal services, community organizing and public policy efforts. THINY is a community-based group whose goal is to ensure that all transgender and gender-variant people can access health care in a safe, respectful and non-discriminatory manner.

THINY arose from the recognition that transgender people face massive and systemic discrimination within the health care system. From instances of humiliation and degradation to outright refusals to provide care, the health care system presents a minefield of discrimination for transgender people seeking to access care. The end result is a community-wide disengagement from the health care system. Rather than enduring abuse and poor treatment, transgender people often simply do without health care.

Our understanding of the difficulties that transgender people face when seeking to access health care animates our response to the proposed amendment to Article 207 of the New York City Health Code.

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We commend the Department for its efforts to update Article 207. We believe, however, that the current proposal continues to treat transgender New Yorkers in a regressive manner and call upon the Department to reconvene a working group that includes, in addition to advocates for the transgender community, a broad spectrum of average transgender people – the people whose lives are affected by this proposal. They can speak to the abuse and neglect that they have suffered at the hands of a transphobic health care system – the very same system empowered to determine whether a transgender person qualifies for an amended birth certificate under the Department’s current proposal.

The Department’s proposal raises fundamental questions about transgender identity and its expression. The core question raised by the proposed policy is, “Who decides?” Who decides when a person is transgender enough to qualify for a new birth certificate? Who decides that the level of medical and psychiatric intrusion into that person’s life is sufficient to qualify that person for gender-appropriate identity documents? We believe that the Department’s answer to these questions in the proposed policy – that the medical and mental health professionals decide – is misguided and harmful to transgender people.

We have a number of suggestions for improving the proposed policy as it currently stands. But we emphasize that the policy should be reconceived at its core and that individual transgender people must have a seat at the table when the policy is revisited.

#### Physician and Mental Health Affidavit Requirements

We believe that the requirement that a transgender person present an affidavit from a physician and a mental health professional must be changed.

To the extent that any modified policy continues to focus on the views of medical and mental health professionals as arbiters of an individual’s gender transition, we believe that the requirement that affidavits be presented be changed such that an affidavit from a physician or mental health professional will suffice. As discussed earlier, transgender people face tremendous discrimination in the health care and mental health systems. Many simply do without health care to avoid the humiliation, stigma, neglect and outright refusals to provide care that often characterize their interactions with the health care system. Additionally, the pervasive poverty and unemployment in the transgender community due to societal discrimination means that most transgender people

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do not have health insurance and cannot afford to access care in the manner contemplated in the Department's proposal.

There are unique problems associated with the requirement of a physician affidavit. The physician affidavit contemplates that a physician will have provided, and will report on, "all medical treatments received by the applicant for the purpose of modifying sexual characteristics." This presumption is rooted in the incorrect notion that transgender people uniformly seek surgical and/or hormonal treatment to complete their transitions. For many transgender people, their transitions are complete without any medical intervention whatsoever. Indeed, throughout most of human history, the medical treatments contemplated in the Department's proposal simply were not available. Many transgender people choose to live full and complete lives in their chosen gender without the aide of costly, invasive and often unwanted medical treatments. For some, surgical and hormonal treatments are medically contra-indicated and would represent a threat to health, and possibly life. They are no less transgender, and no less in need of appropriate identification documents, than an individual who chooses to undergo medical treatments as part of his or her transition.

Similarly, there are problems particular to the requirement of an affidavit from a mental health professional. This requirement is based on the assumption that a transgender person has a "gender identity disorder," a term that many transgender people would reject. It assumes that a transgender person cannot transition without first undergoing "psychological treatments related to his or her gender transition." It is true that the social stigma and discrimination directed towards transgender people can cause great psychological strain for them, and that mental health professionals can play an integral role in relieving that strain. But the notion that mental health professionals *may* be of assistance is different from the assumption that a transgender individual *must* be treated by a mental health professional as a requirement towards obtaining appropriate identification documents. Again, for many transgender people, the cost of obtaining mental health treatment would present a severe financial hardship, or be impossible.

Accordingly, while we object overall to the current proposal's focus on medical and mental health affidavits, we believe that, at a minimum, the current proposal must be modified to require only one affidavit.

### Physician and Mental Health Professional Qualification Requirements

The requirement that the physician presenting the affidavit be board certified should be stricken. Board certified physicians charge higher rates for

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consultations, making it even more costly and difficult for transgender people to obtain the affidavit contemplated in the proposal. The board certification requirement has no bearing on the information sought by the Department. It is unlikely that a physician board certified in internal medicine, for example, can more accurately attest to the transition-related medical treatments that an individual has undergone than a non-certified physician. It is extremely likely, however, that consultations with the board-certified physician will be significantly more expensive.

Additionally, the requirement that the physician and mental health professional providing affidavits have "at least two years experience in the last five years related to transgender treatment" should be stricken. Many transgender individuals are treated by primary care physicians and/or mental health professionals who do not otherwise have significant transgender practices. These professionals provide excellent care to their transgender patients, and where necessary, consult professional literature and/or experts in various fields to provide quality care for their patients. There is simply no reason to disqualify these professionals from providing the required information. Additionally, many transgender people who were born in New York City now live in areas of the country where access to professionals with the required level of experience in transgender treatment is impossible. Accordingly, it is essential that this requirement be modified to ensure that all physicians and mental health professionals providing care to transgender people may provide the necessary affidavits.

#### Two-Year Waiting Period

We believe that the provision requiring that the applicant "has lived in the acquired gender for at least two years" is inappropriate and should be removed. Pursuant to the proposed policy, the Department already will receive a wealth of information about each applicant. To the extent that a doctor or mental health professional has already provided information about the individual's gender transition, the blanket two year requirement is unnecessary, excessive and far too rigid. Additionally, an individual seeks an amended birth certificate in part to be able to live in his or her acquired gender. The requirement that an individual already have done so for two years prior to seeking an amended birth certificate is a "catch 22." Many individuals will find it difficult or impossible to live in their acquired gender without an amended birth certificate. Accordingly, we believe that the two year requirement should be removed from the policy.

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### Name Change

The policy should not require a legal name change as a prerequisite to obtaining a new birth certificate. Many names are gender-neutral. The decision to change one's name is highly personal and may not bear at all on an individual's decision to change his or her gender.

### Age Requirement

We believe that the requirement that the applicant be "over 18 years of age" should be modified. An emancipated minor or other minor with consent of a legal guardian should be granted an amended birth certificate where he or she otherwise complies with the requirements for receipt of one.

### "Catch-all" Provision

The policy provides that, at its discretion, the Department "may request the applicant to provide other information or evidence demonstrating the applicant's transition to his or her acquired gender." This provision should be modified. It must be presumed, absent a contrary showing by the Department, that applicants who comply with the proposal's requirements are entitled to an amended birth certificate. The current proposal places unfettered discretion in the Department's hands to request additional information beyond that required in the proposal, with no guarantee that, at any point, an applicant will finally have satisfied the Department's demands. Such unfettered discretion is inappropriate. Due process demands that limits be placed upon it, and that applicants who comply with the policy's requirements presumptively be granted amended birth certificates absent a detailed explanation from the Department of its grounds for denying an application or requesting additional information.

Thank you for the opportunity to present these comments. Transgender people have waited decades for a humane birth certificate policy that allows them to live their lives as who they are, with appropriate identity documents to allow them to live, work and otherwise participate fully in society. The Department's proposal, unfortunately, is not that policy. We have a unique opportunity to craft a truly progressive policy that meets the needs of the transgender community while addressing the Department's various concerns. I hope you will heed my call to reconvene a working group on this policy. TLDEF and the members of THINY are prepared to assist the Department in any way we can. Rather than rushing to adopt this policy, we propose taking the time now

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to get the policy right. It may be decades before we have another opportunity to do so.

Again, thank you.

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